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Salt Lake City v. Roger J. Alires : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff/Appellee, vs. ROGER J. ALIRES Defendant/Appellant.	**APPELLEE'S BRIEF** **Case No. 990483-CA** Priority No. 2

BRIEF OF THE APPELLEE

Appeal from a conviction and judgment of Telephone Harassment, a class B misdemeanor, in the Third District Court, Salt Lake Department, State of Utah, the Honorable Judith S. H. Atherton, Judge, presiding.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant Utah Code Ann. § 78-2a-3 (1996).

STANDARDS OF REVIEW

Issues of law are reviewed under a correctness standard, without deference to the trial court. *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998).

An "abuse of discretion" standard is applied to determinations under Rule 404(b) of the Utah Rules of Evidence, not the "very limited deference" standard of *State v. Doporto*, 935 P.2d 484 (Utah 1997). *State v. DeCorso*, 1999 UT 57, ¶¶16–18, 370 Utah Adv. Rep. 11, 12. The *DeCorso* opinion clearly gave weight to Justice Zimmerman's separate opinion in *Doporto* and hoped to avoid "diminishing the relative importance of the trial court's judgment and enhancing that of the appellate court." Id. at ¶16. With respect to the balancing of probativeness verses prejudice under Rule 403, *State v. O'Neil,* 848 P.2d 694 (Utah 1993), *cert. denied*, 859 P.2d 585 (Utah 1993), reveals the historical deference given to trial court determinations of this nature: "When reviewing a trial court's balancing of the probativeness of a piece of evidence against its potential for unfair prejudice under Rule 403, we reverse only if the court's decision as a matter of law 'was beyond the limits of reasonability.' *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992)." *O'Neil* at 699.

STATEMENT OF FACTS

Officer Gilbert Salazar of the Salt Lake City Police Department was dispatched to the apartment of Tiffany Brimhall in Salt Lake City on the night of July 18, 1998. Arriving at the apartment complex, Officer Salazar heard "a loud banging" on a window on the south side of the complex. Trial Transcript (hereinafter "Tr.") at 27, ll. 22–23. There he found the Defendant/Appellant, Roger Alires, banging on Ms. Brimhall's window. The talkative (Tr. at 29, ll. 2–3) Mr. Alires informed Officer Salazar that he lived at that apartment, and that his child and significant other were inside. Id., ll. 5–7.

While another officer continued to speak with Mr. Alires, Officer Salazar went in to the apartment and met with Tiffany Brimhall. He perceived Ms. Brimhall to be "very scared" (Tr. at 30, l. 3), to the point that "it was kind [of] hard to understand" her (Id., ll. 10–11) through her "quivering voice" (Id., l. 9) and the fact that "she was talking very rapidly..." (Id., l. 10). Based on his discussion with Ms. Brimhall, Officer Salazar determined that Mr. Alires was not a resident of the apartment at the time and Ms. Brimhall did not want him there. Mr. Alires was allowed to enter the apartment to get a shirt, and was then released.

Just over an hour later, Officer Jill Candland[1] of the Salt Lake City Police Department was dispatched to the same apartment. She found Tiffany Brimhall to be "hesitant to open the door without me identifying who I was." Tr. at 34, l. 9–10. Once

inside, Officer Candland observed that Ms. Brimhall "was very upset, ... speaking in ... a quiet voice, but very, very nervous, ... and [she] appeared to have been crying at some point, her eyes were red and she was ... shaking." Tr. at 34, ll. 14–18.

> I would describe her body language as very closed in, it was like she was trying to protect herself with her shoulders hunched in[. S]he was tearful, [her] voice was shaking, she was very upset. But [she was] speaking in a low voice, not agitated and screaming[. S]he was almost to the point of ... being kind of shock[y], [in] disbelief.

Tr. at 36, ll. 1–7.

In this emotional state, Ms. Brimhall related to Officer Candland the events earlier when Roger Alires had come to her apartment and Officer Salazar had come there. Tr. at 37, l. 6. Ms. Brimhall further related that Mr. Alires had just telephoned her and told her "that he had a knife and that he was going to do something with it and ... that she took that as a serious threat and [that] she was very frightened." Id., ll. 10–13. At this time, still in the condition of being "very upset" and while "she was describing the phone call" (Tr. at 38, ll. 11–12), Ms. Brimhall's telephone rang again. Ms. Brimhall "picked up the phone and said, 'Hello' and then looked at [Officer Candland,] and holding the receiver in her hand she pointed to the mouth piece with her finger and mouthed the word[s], 'That's him' ... [or] 'It's him'... ." Id., ll. 18–21.

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[1] Officer Candland is referred to variously as Jill "Camdland" and "Joel Cammeron" among the interesting transcriptions of the trial Transcript provided by Appellant. Nevertheless, no Officer Cammeron was involved in this matter.

Officer Candland stepped to the phone and overheard the rest of the conversation, during which Ms. Brimhall confronted the caller about the threats received in the earlier telephone call. Rather than deny the threatening nature of that earlier call, the caller said that if Ms. Brimhall "did not take him back, if he could not be with her and his daughter, he would kill her. He repeated this three times. He also said that she would need to watch the daycare." Tr. at 40–41, ll. 23–1.

At that point Officer Candland took the phone and announced, "Mr. Alires, this is [O]fficer Candland ... you've made a serious mistake making this threat on the phone." Tr. at 41, ll. 2–3. Rather than deny the Officer's identification of him as "Mr. Alires," the caller simply "yelled a profanity into the phone and hung up." Id., l. 5.

Defendant/Appellant Roger Alires was subsequently charged with Telephone Harassment, a class B misdemeanor under Salt Lake City Code section 11.08.030. He was convicted of that offense at a jury trial on February 22, 1999.

SUMMARY OF THE ARGUMENT

I. APPELLANT'S APPEARANCE AT TIFFANY BRIMHALL'S APARTMENT WAS PROPERLY ADMITTED EVIDENCE FOR IDENTIFICATION PURPOSES

Rule 404(b) of the Utah Rules of Evidence clearly delineates that "prior acts" testimony may be admissible to show identity. Applying the framework of *State v. DeCorso*, 1999 UT 57, 370 Utah Adv. Rep. 11, to the case at hand indicates that evidence of Defendant/Appellant Roger Alires' (hereinafter, "Appellant") prior appearance at the

victim's home was appropriately admitted for identification purposes. At no point did the prosecution offer this evidence for any purpose other than identification. As an element of the offense, identity is per se relevant. Appellant's appearance at the apartment was not evidence of a crime, but only of an act. Against the low potential for prejudice stemming from that act stands the highly probative nature of the testimony. *DeCorso* and rule 404(b) are satisfied.

II. A FIRMLY ROOTED HEARSAY EXCEPTION DOES NOT VIOLATE THE STATE OR FEDERAL CONFRONTATION CLAUSES

As a firmly rooted hearsay exception, the "spontaneous declaration," or excited utterance, has been held by the United States Supreme Court to not violate the federal Confrontation Clause even without a finding of the declarant's unavailability. Also, given the context in the present case, where additional indicia of reliability are plentiful and the declaration was offered only for identification purposes and not to show the corpus of the offense, the allowed evidence satifies the concerns of both state and federal confrontation clauses. No analysis has been provided to indicate that the state protections in this instance should be different from the federal. In fact, state case law indicates that the Utah Supreme Court has already found the federal approach to be appropriate. Should this Court decide to adopt some version of Appellant's proposed unavailability rule, Appellee urges the Court to define "unavailability" on a continuum based on the level of the offense and the potential punishments.

III. THE STATE CONSTITUTION'S CONFRONTATION CLAUSE SHOULD NOT BE INTERPRETED DIFFERENTLY THAN THE FEDERAL CLAUSE

Appellant ignores *State v. Smith*, 909 P.2d 236 (Utah 1995), in which the Utah Supreme Court incorporated the reasoning of *White v. Illinois*, 502 U.S. 346, 112 S.Ct. 736 (1992), in the context of analyzing Utah's excited utterance exception. Appellant has failed to provide an analysis of Article I, section 12 of the Utah Constitution (Utah's Confrontation Clause) to show why it should be interpreted differently from previous Utah case law or federal law on this issue.

IV. THE QUESTION OF "AVAILABILITY" SHOULD BE REVIEWED IN TERMS OF THE LEVEL OF THE OFFENSE

The question of whether or not the witness Tiffany Brimhall was "unavailable" is not clear from the record. The record reflects only that the prosecution believed that a subpoenaed witness had been contacted by an agent of the government within a matter of days before trial and that the witness, though afraid, would be present. Given the questionable availability of the witness, then, coupled with the high level of reliability of the hearsay offered in this particular case, reversal is an inappropriate remedy. However, should this Court decide to adopt some version of Appellant's proposed unavailability rule, Appellee urges the Court to define "unavailability" based on the level of the offense and the potential punishments.

V. THE OVERHEARD TELEPHONE CALL IS NOT HEARSAY

Appellant claims that the telephone caller's statements were hearsay. However, rule 801(d) establishes that statements by a party, which are offered against that party, are not hearsay. In addition, because the threats made by Appellant embodied the charged offense, the probative nature outweighs any prejudicial effect.

ARGUMENT

I. APPELLANT'S APPEARANCE AT TIFFANY BRIMHALL'S APARTMENT WAS PROPERLY ADMITTED EVIDENCE FOR IDENTIFICATION PURPOSES

A. Rule 404(b) does not require a showing of a similar fashion or pattern

Evidence of Appellant's earlier appearance at the home of Tiffany Brimhall was admitted, over Appellant's motion in limine, for identification purposes. Tr. at 3, ll. 24–25. Appellant argues that this ruling was incorrect because evidence of his appearance at the home should be excluded under a rule 404(b) analysis.

Rule 404(b) of the Utah Rules of Evidence clearly delineates that "prior acts" testimony may be admissible to show identity.

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Utah R. Evid. 404(b).

The recent Utah Supreme Court case of *State v. DeCorso*, 1999 UT 57, 370 Utah Adv. Rep. 11, provided a framework for rule 404(b) analyses. Appellant, however, is reversing the logic of *DeCorso*, as well as that of *State v. Johnson*, 748 P.2d 1069 (Utah 1987), to meet his own ends. Neither *DeCorso* nor *Johnson* limit "prior acts" testimony to the purpose of showing a "common plan, scheme, or manner of operation." Instead, these cases limit the allowable purpose of "common plan" testimony to proving a material fact *such as* identity. This limitation helps to assure that the "common plan" is not offered to show a propensity to commit crime.

In any event, the evidence at issue in the present case is not evidence of a common plan, scheme, or manner of operation. Moreover, identity of the perpetrator is clearly a material fact.

Applying the framework of *DeCorso* to the case at hand indicates that evidence of this prior appearance was appropriately admitted for identification purposes. The *DeCorso* framework includes the following elements:

> ... [W]e now explain the proper analysis to be applied by the trial court in deciding whether to admit evidence of other crimes, wrongs, or bad acts under rule 404(b).
>
> As the amendment to rule 404(b) now makes clear, in deciding whether evidence of other crimes is admissible under rule 404(b), the *trial court must determine (1) whether such evidence is being offered* for a proper, noncharacter purpose under 404(b), (2) whether such evidence meets the requirements of rule 402, and (3) whether this evidence meets the requirements of rule 403.
>
> Under the first part of this analysis, the proponent must demonstrate that the evidence is actually being offered for a proper, noncharacter purpose, *such as those specifically listed in the rule.*

State v. DeCorso, 1999 UT 57, ¶¶19–21, 370 Utah Adv. Rep. 11, 13 (emphasis added).

In addressing Appellant's motion in limine to exclude testimony of Appellant's earlier appearance at the home, the trial court ruled that "it's relevant to the issue of the identification[,] so I'm going to deny that [motion.]" Tr. at 3, ll. 24–25. The trial court's ruling was correct. Identification, as will be discussed at length in this brief, was the crux of this case for the prosecution and is a "proper, noncharacter purpose" that is "specifically listed" in rule 404(b). At no point did the prosecution offer the testimony of Appellant's recent appearance at the home for any purpose other than identification. The first prong of *DeCorso* is satisfied.

The second prong of *DeCorso* requires that the offered evidence is relevant pursuant to the definition of relevance under rule 402 of the Utah Rules of Evidence. As an element of the offense, identity is always relevant.

> When evidence may establish constitutive elements of the crime of which the defendant is accused, in the case on trial, it is admissible even though it tends to prove that the defendant has committed other crimes. *See State v. Wareham*, 772 P.2d 960 (Utah 1989), and cases cited therein; *see also State v. Johnson*, 748 P.2d 1069, 1075 (Utah 1987) (*evidence of other crimes was probative and necessary to prove identity of defendant*); *State v. Smith*, 700 P.2d 1106, 1110 (Utah 1985)....

State v. Featherson, 781 P.2d 424, 426 (Utah 1989) (emphasis added). Therefore, the second prong of *DeCorso* is satisfied.

B. Evidence of Appellant's appearance at the victim's home was more probative than prejudicial

As indicated, Utah case law has established that even duplicate prior crimes can be admissible for identification purposes. The prejudicial effect of evidence of prior crimes is considered under the third prong of *DeCorso*, which calls for a balancing of the potential prejudicial effect against the probativeness of offered evidence, pursuant to evidentiary rule 403.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403. With regard to this third prong balancing, *DeCorso* clarified that there is "no presumption against the admission of other crimes evidence if it was being offered for a proper, noncharacter purpose." *DeCorso* at ¶24. By comparison, the evidence at issue here—Appellant's recent appearance at the victim's apartment—could not be as prejudicial as the kinds of duplicate crimes at issue in *DeCorso* or *Johnson*. In *DeCorso*, for example, duplicate manners of operation in an unadjudicated burglary were allowed for identification purposes. In *Johnson*, evidence of a prior, duplicate forgery offense was held to be "directly probative on the issue of identity" because a witness to the prior offense identified the defendant, as well as "indirectly probative" as to identity because of similarities in the offenses.

Appellant's appearance at the apartment was not evidence of a crime, but only of an act. He was not cited or arrested for any offense when the police arrived. No testimony was offered of conduct similar to that involved in the Telephone Harassment charge, such as threatening language or behavior. In fact, Appellant was allowed to enter the home, accompanied by Officer Salazar, in order to change his shirt.

Against the relatively low potential for prejudice stemming from this act stands the highly probative nature of the testimony. In this case of Telephone Harassment, Appellant's recent appearance at the home of the recipient of the offending call provided compelling evidence that he was in fact the caller. During that appearance at the home, Salt Lake City police officer Gilbert Salazar saw Appellant there and spoke to him. Officer Salazar could therefore connect the name "Roger Alires" to the defendant sitting in court. In addition to telling Officer Salazar his name, during this contact Appellant told the officer, "my baby's in there" (Tr. at 29, l. 5) and, although the officer couldn't recall specifically, that either Alires' "wife or his girlfriend was in there" (Id., l.7).

This evidence was vital in order to connect Appellant to the later telephone call overheard by Officer Jill Candland. In that overheard call, the caller stated "that if he could not be with [Ms. Brimhall] and his daughter, he would kill [Ms. Brimhall]." Tr. at 40, ll. 23–24. "He also said that she would need to watch the daycare." Id. at 40–41, ll. 25–1. Appellant's appearance at the home so recently, his acknowledged relationship with the inhabitants of the home, and his evident concern with those inhabitants (*see, supra*,

Appellee's Statement of Facts) act as weighty evidence of identification when combined with the content of the telephone call overheard by Officer Candland.

> [The] tendency [of evidence of other crimes] to lead the finder of fact to an improper basis for decision must ... be balanced against its probative nature and the need for such evidence in proving a particular issue. E. Cleary, McCormick on Evidence, § 190, at 565 (3d ed. 1984) suggests the factors to be evaluated in the balancing process:
>
> > The problem is not merely one of pigeonholing, but of classifying and then balancing. In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, *the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.*

State v. Shickles, 760 P.2d 291, 295 (Utah 1988) (emphasis added). As indicated, the need for evidence was of the highest level in the instant case. Further, because this conduct of Alires' appearance at the house was, at worst description, a bad act, not rising to the level of abhorrent behavior or a charged or duplicate crime, it was not the sort of evidence that would "rouse the jury to overmastering hostility." *Id.*

II. A FIRMLY ROOTED HEARSAY EXCEPTION DOES NOT VIOLATE THE STATE OR FEDERAL CONFRONTATION CLAUSES

A. The excited utterance exception is a "firmly rooted" hearsay exception

Appellant has not contested on appeal the trial court's rulings that the statements made to Officer Candland by Tiffany Brimhall (discussing Roger Alires and mouthing the words "It's him" when the second call came in) were excited utterances.[2] (*See*, *supra,* Appellee's Statement of Facts; *see also* Tr. at 7, ll. 20–22 ("I believe the pro[ff]er ... would clearly be admissible under the excited utterance doctrine"), Tr. at 34–35, ll. 23–1, and Tr. at 36, ll. 16–17.) Nevertheless, the nature and context of those utterances, discussed in more detail below, are important in regard to Appellant's constitutional challenges. Therefore it is necessary to emphasize the favored status of the excited utterance exception in the eyes of this nation's highest court.

For over one hundred years, the United States Supreme Court has been "careful 'not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements,' *Idaho v. Wright*, (1990) 497 U.S. 805, 814, 110 S.Ct. 3139, 3146 ...." *White v. Illinois*, 502 U.S. 346, 352, 112 S.Ct. 736, 741 (1992). Nevertheless, in those instances where hearsay exceptions do not fall under the "firmly rooted" banner, the Confrontation Clause of the Sixth Amendment to the United States

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[2] "Alires does not dispute, for the purposes of this appeal, the trial court's ruling that, under current Utah law, the evidence could fall under the excited utterance exception." Br. of Appellant at 20, n. 2.

Constitution protects defendants from out-of-court declarations presented as evidence without "sufficient guarantees of reliability." *Id.*, 502 U.S. at 356, 112 S.Ct. at 743.

The hearsay exception known in the common law as the "spontaneous declaration," however, has been codified as the "excited utterance" in both rule 803(2) of the Federal Rules of Evidence[3] and in rule 803(2) of the Utah Rules of Evidence. It is considered to be one of the most firmly rooted of the traditional hearsay exceptions. As noted in the unanimous United States Supreme Court decision of *White v. Illinois*,

> ... the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations ... is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.[Footnote 8]
>
> [Footnote 8:] Indeed, it is this factor that has led us to conclude that "firmly rooted" exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause. See *Idaho v. Wright*, 497 U.S. 805 817, 820-821 (1990) *Bourjaily v. United States*, 483 U.S. 171, 182-184 (1987). There can be no doubt that the two exceptions we consider in this case are 'firmly rooted." The exception for spontaneous declarations is at least two centuries old, see 6 J. Wigmore, *Evidence*, 1747, 195 (J. Chadbourn rev. 1976), and may date to the late 17th century. See *Thompson v. Trevanion*, 90 Eng.Rep. 179 (K.B. 1694). It is currently recognized under the Federal Rules of Evidence, Rule 803(2), and in nearly four-fifths of the States. See Brief of Amici Curiae for the State of California, et al., pp. 15-16, n. 4 (collecting state statutes and cases).
> ...

Id., 502 U.S. at 355 n.8, 112 S.Ct. at 742 n.8.

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[3] The federal rule's language closely mirrors that of Utah (or vice versa): "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2).

The U.S. Supreme Court recently reiterated its commitment to the spontaneous declaration / excited utterance as a "firmly rooted" exception to the hearsay rule in dicta in *Lilly v. Virginia*, 119 S.Ct. 1887 (1999). In *Lilly* the Court also reiterated its position "that the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness... .'"[4] *Lilly*, 119 S.Ct. at 1898.

B. As a firmly rooted hearsay exception, admission of an excited utterance does not contravene the confrontation clauses of the Sixth Amendment or the Utah Constitution

1. Excited utterances are inherently reliable

Appellant asks this Court to establish the same "'wholesale revision of the law of evidence' under the guise of the Confrontation Clause" that has been rejected by the United States Supreme Court. *White*, 502 U.S. at 354, 112 S.Ct. at 741, quoting *U.S. v. Inadi*, 475 U.S. 387, 394, 106 S.Ct. 1121, 1125 (1986). When a case raises the issue of hearsay exceptions, the *White* court reasoned, it "'must be read consistently with the question it answered, the authority it cited, and its own facts.'" *Id.*

Doing just that in *U.S. v. Inadi*, the U.S. Supreme Court reviewed a situation where statements of a co-conspirator had been accepted as evidence even though there was no

[4] The *Lilly* Court held that "an accomplice's statements that shift or spread the blame to a criminal defendant" are not firmly rooted under federal law, nor do they contain sufficient

showing of unavailability. The *Inadi* situation was highly analogous to the present case, where a declarant subpoenaed by the government simply failed to appear.

Other parallels exist between the co-conspirator situation in *Inadi* and the excited utterance situation of the present case:

> In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

Inadi, 475 U.S. at 395, 106 S.Ct. at 1126. By adopting and paraphrasing the above language from *Inadi*, we can apply that court's reasoning to the present case, as follows:

The relative positions of parties in an ongoing relationship—such as estranged former cohabitants who have a child together—will usually have changed in the months between an excited utterance and a trial. The declarant and the defendant will have changed from the fear and intensity of the moment at issue to a state of truce, or even a renewed state of affection. Or, the declarant herself may be facing continued fear of the defendant, perhaps even threats from him. Under either scenario, the declarant may have little incentive to either reopen wounds that are months old, or to incur the wrath of the

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guarantees of trustworthiness without the opportunity for cross examination. *Lilly*, 119

defendant all over again. In either situation, it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the "excitement" of the moment was in full force.

What Ms. Brimhall's testimony would have been at the time of trial is unknown. However, it would have been testimony in addition to, and not in place of, the contested excited utterance. "[I]f the declarant either is unavailable, or is available and produced by the prosecution, the statements can be introduced anyway." *Id.*, 475 U.S. at 396, 106 S.Ct at 1126-1127. The U.S. Supreme Court rejected the concept of a "constitutional 'better evidence' rule" (*Id.*) for good reason. No trial testimony can replace the probative nature of an excited utterance made at the time of an offense.

Like the co-conspirator statements at issue in *Inadi*, no "strong similarities exist between [excited utterance] statements and live testimony at trial." *Id.*, 475 U.S. at 395-396, 106 S.Ct at 1126.

> To the contrary, [excited utterance] statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, 'only clear folly would dictate an across-the-board policy of doing without' such statements. Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, The Future of Confrontation, 77 Mich.L.Rev. 1185, 1193, n. 35 (1979)."

Id. The admission of the excited utterance "actually furthers the 'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in

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S.Ct. at 1898.

criminal trials."' *Tennessee v. Street*, 471 U.S. 409, 415, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425 (1985), quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970)" *Id.* The admission of such firmly rooted hearsay exceptions advances the truth-determining process by putting before the trier of fact declarations of a probative nature that cannot be matched by in-court testimony.

Inadi acted as a limitation of the scope of *Ohio v. Roberts*, 448 U.S. 56 (1980), a case interpreted by some as issuing a general rule that a finding of unavailability is required before the admission of even firmly rooted hearsay exceptions. This is the rule that Appellant asks this Court to impose. Appellant's expansive reading of the Confrontation Clause, however, was negated also by the U.S. Supreme Court in *White v. Illinois.* In *White*, a *unanimous*[5] United States Supreme Court concurred with *Inadi* that it was an overly expansive reading of *Ohio v. Roberts* to "suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence." *White v. Illinois*, 502 U.S. 346, 353, 112 S.Ct. 736, 741.

White v. Illinois involved an objection to hearsay evidence of a child's excited utterances about a sexual assault. The *White* court adopted the rationales discussed *supra* in terms of *Inadi.*

> These observations [in *Inadi*], although expressed in the context of

[5] A concurring opinion issued by Justices Thomas and Scalia would have applied an even more narrow reading of the Confrontation Clause, leading to the same result.

> evaluating co-conspirator statements, apply with full force to the case at hand. We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations ... is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.[ ] But those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.

Id., 502 U.S. at 355-356, S.Ct. at 742-43.

The *White* court could not have been more explicit in its rejection of the general unavailability rule:

> We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant's later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose the promotion of the "'integrity of the factfinding process.'" *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)). And as we have also noted, a statement that qualifies for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability. *Wright*, 497 U.S., at 820-821.

White, 502 U.S. at 356-357, 112 S.Ct. at 743.

Appellant has provided two non-binding cases as examples of other states' courts that have questioned the application of *White* in all situations. The cases provided, however, concern situations where the courts were asked to go to the other extreme—to find that firmly rooted exceptions to the hearsay rule are *always* admissible without

consideration of Confrontation Clause concerns. Generally, following *Inadi* and *White*, the finding that a hearsay declaration falls within a firmly rooted exception means that there are sufficient guarantees of trustworthiness to overcome Confrontation Clause concerns. Appellee acknowledges that there may be situations in which a declaration rises to the level of an excited utterance but the surrounding indicia of reliability are not sufficient even for a firmly rooted hearsay exception to overcome the Confrontation Clause.

There is no reason, however, for the kind of extreme, across-the-board rule encouraged by Appellant. *Inadi* and *White* do not stand for the proposition that availability can never be a factor. The *Inadi* court, in fact, simply limited the scope of *Ohio v. Roberts*, 448 U.S. 56 (1980), stating that "*Roberts* cannot fairly be read to stand for the radical proposition that *no* out of court statement can be introduced by the government without a showing that the declarant was unavailable." *Inadi*, 475 U.S. at 395, 106 S.Ct. at 1126 (emphasis added). This is exactly the radical proposition that Appellant asks this court to turn into state law. But there are simply too many legal and factual nuances for such a "general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay." *Id.*, 475 U.S. at 392, 106 S.Ct. at 1124. Rather than diving blindly from the "height of wrong-headedness" (*White*, 502 U.S. at 357, 112 S.Ct. at 743) as Appellant proposes, the reasonable approach is to

view firmly rooted hearsay exceptions as creating a presumption of constitutionality, which trial courts could review on a case-by-case basis, each in its own context.

2. The context of statements at issue provides the highest level of reliability

Context in this case is everything. Like statements of a co-conspirator, an excited utterance "often will derive its significance from the circumstances in which it was made." *Inadi*, 475 U.S. at 395, 106 S.Ct. at 1126. The context of the statements in this case offer indicia of reliability that exemplify the fundamental concept of *Inadi* and *White*: that a hearsay declaration can derive sufficient value from the context in which it was made to be irreplaceable as substantive evidence.

The first contextual factor supporting the reliability of the statements at issue here is the nature of the declarations themselves. The declarations here identified the caller to police, when Tiffany Brimhall excitedly uttered to Officer Candland that Roger Alires had just called, and then mouthed the words, "It's him." Officer Candland heard the offense of Telephone Harassment take place, and that officer was available for cross-examination at trial. Appellant, then, was not convicted on the basis of an *offense* that was described to the trier of fact by an unavailable witness. This *was* the situation in one of the cases cited by Appellant, *State v. Case*, 752 P.2d 356 (UT App 1987). Like most of the scenarios cited by Appellant, *Case* did not involve a firmly rooted exception to the hearsay rule. Instead, *Case* involved evidence in the form of prior testimony, which the U.S. Supreme Court distinguished in *Inadi*. "[F]ormer testimony often is only a weaker

substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony." *Inadi*, 475 U.S. at 394, 106 S.Ct. at 1126.

By contrast with the identification-oriented declarations of Tiffany Brimhall, the hearsay at issue in *Case* exemplifies the broad variations of hearsay. *Case* involved an aggravated assault that allegedly occurred when the defendant and the victim were alone in a hotel room.

> Defendant could only be found guilty through the victim's testimony that he stabbed her and that she was not in the process of trying to end her life. The right of confrontation is most critical in a situation such as this. Two conflicting stories are told with little or no corroborative evidence available.

Case, 752 P.2d 356, 358. As mentioned, prior testimony by itself does not approach the level of inherent reliability found in excited utterances. However, even if the hearsay evidence in *Case* had been an excited utterance about the alleged event, it would not have held the reliability of the statements in the present case. Tiffany Brimhall's excited utterances were made before any offense occurred and were admitted into evidence solely for the purpose of identification. In *Case*, the hearsay embodied the offense itself.

The second contextual factor indicating the statements' reliability is the substantial testimony supporting the trial court's ruling that Ms. Brimhall's declarations were, in fact, excited utterances. *See, supra*, Appellee's Statement of Facts. Not one, but two officers, separated by an hour, separately observed the "excited nature" of Ms. Brimhall. Officer Candland in particular described in detail Ms. Brimhall's multiple physical symptoms

indicating that she was "under the stress of excitement caused by the event[s]" that she related. Utah R. Evid. 803(2).

Furthermore, the statements were nearly contemporaneous and precisely contemporaneous to the events that inspired them. First, Ms. Brimhall told Officer Candland that her boyfriend Roger Alires had called her since the last officers had left, less than an hour before. Tr. at 27, ll. 14–17, at 33, l. 14, at 36, ll. 20–24, and at 37, ll. 9–10. Then she mouthed the words "That's him" or "It's him" immediately upon hearing the caller's voice when the phone rang in the officer's presence.

> Usually the most difficult issue in determining the admissibility of an excited utterance is whether the statement was uttered with a spontaneity produced by emotional excitement to a degree that provides a warrant of trustworthiness. The determination requires an evaluation of a variety of factors, including the nature of the startling event and the intensity of the excitement or other emotional effect on the declarant.[ ] The statement need not be strictly contemporaneous with the startling event to be spontaneous, ... but the justification for the exception disappears as the emotional excitement of the declarant subsides and the declarant's capacity for reflection revives. Thus, *although the utterance need not be contemporaneous with the event, temporal proximity is a factor to be considered. State v. Wetzel*, 868 P.2d 64, 69 (Utah 1993).

State v. Smith, 909 P.2d 236, 240 (Utah 1995) (emphasis added). In the present case, the temporal proximity of the statements may be considered in the context of satisfying the concerns of the Confrontation Clause.

The third contextual factor indicating the statements' reliability is the subsequent behavior of Ms. Brimhall. After Ms. Brimhall declared that "It's him," she continued to

listen to the caller and to allow the police officer to listen. If she had been fabricating—that is, if the caller was not "him" (Roger Alires)—it is doubtful that she would have turned the call over to the officer's review. What we have in this context is a hearsay declarant who spontaneously and contemporaneously submits her declaration to the review of law enforcement. This act is a weighty indication of reliability.

Furthermore, additional, nonhearsay evidence substantiated Ms. Brimhall's declaration. First,as discussed previously, there was the evidence of Appellant's earlier appearance at Ms. Brimhall's apartment and his relationship with her, including the fact that they have a daughter together. The caller's statements indicating a relationship with Ms. Brimhall and references to their daughter create an obvious nexus between Roger Alires and the caller. And when confronted by Officer Candland, who named the caller "Mr. Alires" (Tr. at 41, l. 2), the caller did not object to this appellation.

Cumulatively, these indicia support a ruling that the hearsay offered in this case was appropriately allowed not only as an excited utterance, but as evidence undeniably "consistent with notions of fundamental fairness" on a constitutional level. *Layton City v. Peronek*, 803 P.2d 1294, 1299 (Utah Ct. App. 1990).

3. The case law submitted by Appellant can be distinguished

Unlike the many guarantees of trustworthiness in the present case, most of the cases selected by Appellant, such as *State v. Case* (discussed above) or *State v. Webb*, 779 P.2d 1108 (Utah 1989), involve hearsay exceptions that are remote from firmly rooted

exceptions like excited utterance. *State v. Webb*, for example, concerns a case where a child's hearsay statement was allowed pursuant to a "hearsay exception spelled out in section 76-5-411[, which] is a recent creation, not one that is 'firmly rooted' in common law." *Webb* at 1112.

The situation in *Webb*, in fact, was so extreme that the majority of the Utah Supreme Court held that remand to the trial court was not appropriate as it was "beyond credulity that the law could allow a conviction to stand on such evidence." *Id.* at 1115. The child's statement was uncorroborated and nonspecific. First, the child's statement at issue in *Webb* was not offered to prove an element such identity, but (like in *State v. Case*) was the primary evidence that any offense had occurred at all. The statement was not specific as to the cause of any injury, and only contradictory evidence in the form of physicians' diagnoses was produced as to whether or not there ever had been an injury, let alone as to its cause. *Webb*, then, deals with a statement unsupported by any corroborating evidence of the kinds previously discussed with regard to the present case, let alone an independent witness who testified in court as to the corpus of the offense.

State v. Carter, 888 P.2d 629 (Utah 1995) and *State v. Menzies*, 889 P.2d 393 (Utah 1994), both dealt with the "former testimony" hearsay exception, which was expressly distinguished in *Inadi*. (*See also* discussion of *State v. Case, supra*, in this section.) In addition, in *Menzies* the witness was present at the trial but "unavailable" because he refused to testify. Appellant pushes the limits of credibility with his assertion that,

through *Carter* and *Menzies*, "the Utah Supreme Court has implicitly rejected the holdings of *Inadi* and *White*." Br. of Appellant at 17.

Along the same lines, Appellant claims that in *State v. Moosman*, 794 P.2d 474 (Utah 1990), the Utah Supreme Court "appear[s] to ignore the holdings of *Roberts*, *Inadi*, and *White*... ." Id. at 18. *Moosman*, however, was decided before *White*.

In any event, even if the *Moosman* criteria are applied to the present matter, the second prong of those criteria are not met in this instance. "Second, we look at the availability of the declarant and whether the presence of the declarant will add any *probative value to the evidence* by allowing the trier of fact to observe the demeanor of the witness." *Moosman* at 480 (emphasis added). With regard to the excited utterance exception, the witness' demeanor at the time of trial adds nothing to the probative value of a statement made simultaneously with extreme circumstances observed by an officer many months prior. The trier of fact needs to weigh the sufficiency of that statement in and of itself. Only *separate and additional* evidence can be offered by having the declarant testify at trial. Such separate and additional testimony might have its own probative value, whether cumulative or as rebuttal evidence, had Appellant himself called the declarant as a witness. (*See* section IV., *infra*, for a discussion concerning Appellant's options.) One way or the other, the evidence would have been separate, additional testimony, not a repeat of the evidence, as is the case with prior testimony situations.

Further, in *Moosman* the Court indicates that, "[o]n appeal, the burden is on the appellant to show that each part of the test indicates that his right to confrontation was violated by admission of the hearsay evidence." *Moosman* at 480. In *Moosman*, a supervising pathologist had testified, rather than the pathologist who actually performed the autopsy. The testifying pathologist's testimony was based in part on the written hearsay of the latter pathologist, who was not present at trial.

> The second part of the test requires that defendant show that the testimony of Dr. Salazar[, the pathologist who performed the autopsy,] would be more reliable than the testimony of Dr. Sweeney[, the supervisor who testified]. ...
>
> It is inconceivable that Dr. Salazar's testimony would be *more reliable* than Dr. Sweeney's. The trial occurred approximately eighteen months after the autopsy, and Dr. Salazar would likely have had to rely on his own autopsy notes, as did Dr. Sweeny. Because Dr. Sweeney supervised the autopsy and discussed the results with Dr. Salazar, there is no reason to believe that Dr. Salazar's testimony would differ from Dr. Sweeney's.

Id. at 480 (emphasis added). Given the context of the excited utterance in the present case, it is also inconceivable that the testimony of a domestic violence victim would be "more reliable" nine months later in a trial setting. Appellant here has not offered any compelling reason as to why Ms. Brimhall's testimony at trial would have been more reliable than the offered hearsay evidence under the excited utterance exception.

The Court in *Moosman* also relied in part on the Second Circuit Court of Appeals' decision in *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1989), citing that case for the proposition that "[t]he confrontation clause is not

necessarily violated by the prosecution's failure to produce a hearsay declarant for cross-examination at trial where the 'utility of trial confrontation' would be 'remote' and of little value to either the jury or the defendant." *Moosman* at 481, quoting *Reardon v. Manson*, 806 F.2d 39, 41 (2d Cir. 1986).

III. THE STATE CONSTITUTION'S CONFRONTATION CLAUSE SHOULD NOT BE INTERPRETED DIFFERENTLY THAN THE FEDERAL CLAUSE

A. Appellant ignores cases which adopt the federal approach

In *State v. Smith*, 909 P.2d 236 (Utah 1995), decided after *Moosman*, *Menzies*, and *Carter*, the Utah Supreme Court incorporated the reasoning of the *White* court in the context of analyzing Utah's excited utterance exception.

> Even though excitement may in some instances distort a person's perception or other cognitive powers that affect the accuracy of a person's statements,[ ] it is, nonetheless, generally true that excited utterances are likely to have greater evidentiary value to a trier of fact than in-court statements to the same effect. In holding that the excited utterance exception does not violate the federal Confrontation Clause, Chief Justice William Rehnquist made that point for the Court in *White v. Illinois*, 502 U.S. 346, 355-56, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992):
>
> > But those same factors that contribute to the statements' reliability cannot be recaptured, even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.

State v. Smith, 909 P.2d at 240-41.

Other Utah cases suggest that, according to Utah tradition, a review of the individual case is appropriate rather than an across-the-board rule.

> Whether the use of documentary hearsay as a substitute for "live" testimony by an accuser is violative of the Confrontation Clause turns on the indicia of reliability of the document or statement sought to be admitted. *Id.* at 65-66; *United States v. Bell*, 785 F.2d 640, 643 (9th Cir. 1986); *State v. Moosman*, 794 P.2d 474, 481 (Utah 1990); *State v. Webb*, 779 P.2d 1108, 1112 (Utah 1989); *Bertul*, 664 P.2d at 1183. We therefore consider whether the incident report was endowed with sufficient indicia of reliability and accuracy so as to be admissible, consistent with notions of fundamental fairness, as a substitute for testimony by—and the corresponding opportunity for cross-examination of—defendant's accuser...

Layton City v. Peronek at 1299. Also, in *State v. Nelson*, 725 P.2d 1353 (Utah 1986) the Utah Supreme Court examined the issue of unavailability in the context of a child's out-of-court statement under Utah Code 76-5-411(1). Following its analysis under the federal constitution, the court stated in *Nelson* that, "Although the issue has not been decided under the Utah Constitution, we are not persuaded that the rule should be different." *Nelson*, at 1356.

B. Appellant does not provide an analysis sufficient to show why the state Confrontation Clause should be interpreted differently

Appellant has failed to provide an analysis of Article I, section 12 of the Utah Constitution (Utah's Confrontation Clause) that shows why it should be interpreted differently from prior Utah case law or federal law on this issue. "'Because appellants failed to develop any meaningful state constitutional argument below, our analysis must proceed solely under federal constitutional law.'" *West Valley City v. McDonald*, 948

P.2d 371, 375 (Utah Ct. App. 1997), quoting *State v. Dudley*, 847 P.2d 424, 426 (Utah Ct. App. 1993). Appellant states repeatedly that greater protections *can* be afforded, but he has not shown *why* that is appropriate here, particularly in light of the breadth and impact of the proposed, general "unavailability" rule.

As pointed out by Appellant, prior to *Inadi* and *White*, the Utah Supreme Court adopted the federal approach, as embodied by the two-prong test of *Ohio v. Roberts*, in *State v. Brooks*, 638 P.2d 537 (Utah 1981). Br. of Appellant at 23. As pointed out *supra* in this brief, following *Inadi* and *White*, the Utah Supreme Court adopted the federal approach again in *State v. Smith*. Nevertheless, the only historical rationale offered by Appellant, without analysis, is a broad reference to persecution of polygamists.

State v. Villareal, 889 P.2d 419 (Utah 1995) and other cases are cited by Appellant for the proposition that "under the Utah Constitution, the right to confrontation has been specifically protected by Utah Courts." Br. of Appellant at 24. There is no doubt that the Utah Constitution provides accused persons the right of confrontation. However, once again, the cases cited by Appellant do not deal with the issue before this Court, but with other kinds of confrontation issues or hearsay exceptions that are not "firmly rooted." One of the closest proximities to the issue at hand is found in *Villareal*, which dealt with hearsay admissions of an accomplice in crime. In *Villareal*, however, the admissions were

"presumptively unreliable"[6] (*Villareal,* at 419) rather than excited utterances, which are "made in contexts that provide substantial guarantees of their trustworthiness" (*White*, 502 U.S. 355-356, 112 S.Ct. at 742-43).

IV. THE QUESTION OF "AVAILABILITY" SHOULD BE REVIEWED IN TERMS OF THE LEVEL OF THE OFFENSE

Appellant offers *State v. Drawn*, 791 P.2d 890 (Utah Ct. App. 1990), as one example of case law indicating the kinds of actions that can support a finding of unavailability. Br. of Appellant at 20. Of course, *Drawn* dealt with hearsay admitted through the exceptions of rule 804 of the Utah Rules of Evidence, in which unavailability is a statutory *prerequisite* for application of the listed exceptions. Nevertheless, if we accept the *Drawn* factors simply as examples and apply them to the present situation, Tiffany Brimhall would have to be considered unavailable, despite the trial court's brief assertion to the contrary. (The trial court made no formal findings as to unavailability, but simply stated at one point prior to trial that, "It's clear... [Ms. Brimhall is not] an unavailable witness[. S]he's available, she's just not here." Tr. at 9, ll. 17–19.)

The record indicates through a proffer on the part of the prosecutor that the prosecution knew that Tiffany Brimhall was afraid of Appellant, but also that a victim

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[6] Post-arrest admissions of an accomplice, of course, are unlike statements of a co-conspirator made in furtherance of a conspiracy, as in *Inadi*. *See also* note 2, *supra*, concerning *Lilly v. Virginia*, 119 S.Ct. 1887 (1999).

advocate[7] had been in contact with Ms. Brimhall only five days prior to the trial (Tr. at 1, ll. 5–8), and that the victim advocate had informed the prosecutor (Id.) that the victim advocate "was anticipating [Ms. Brimhall] being here." Id., ll. 8–9. Although Appellant asserts that Ms. Brimhall "had not shown up for the original jury setting" (Br. of Appellant at 21), there is no information in the record indicating why. Furthermore, Appellant acknowledges that the victim advocate had been in contact with Ms. Brimhall "over the course of several months." Id. Based on that continuous contact, the contact with her only days before trial, and the victim advocate's representation to the prosecutor that Ms. Brimhall was expected to be there, the reasonable intimation is that the City's agents believed she would appear despite her nonappearance at the first jury setting.

The record, then, reflects only that the prosecution believed that a subpoenaed witness had been contacted by an agent of the government within a matter of days before trial and that the witness, though afraid, would be present. "Once the location of a witness is known *and the state is aware that efforts to secure voluntary compliance will be unavailing*, the state cannot simply choose to disregard statutory mechanisms to secure the compulsory attendance of a witness." *State v. Chapman*, 655 P.2d 1119, 1123 (Utah 1982) (emphasis added). In the present case, the prosecution believed that voluntary compliance had been secured. There is no way the government can compel all witnesses to appear, especially in the high-volume misdemeanor context.

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[7] The phrase "victim advocate" has been transcribed variously as "Dick Matick" and "Mr.

In this brief, Appellee has assumed, *arguendo*, due to the lack of additional information or findings on the record, that Ms. Brimhall was not legally unavailable. Under that assumption, Appellee's position is that excited utterances, when found to be sufficiently reliable based on their inherent reliability and on their context, can provide a window back in time, acting as the closest thing to the truth that can be presented to a trier of fact without an audio-visual recording of the incident itself. If evidence in the form of an excited utterance is found to have the requisite indicia of reliability, it stands on its own, with or without the declarant's presence.

Given the questionable availability of the witness, then, coupled with the high level of reliability of the hearsay offered in this particular case, reversal is an inappropriate remedy.

Furthermore, it is important to remember that such a hearsay exception is inclusive, not exclusive. Allowing evidence of an excited utterance does not exclude the possibility of rebuttal. As in the present case, *Inadi* involved a situation where a declarant subpoenaed by the government simply failed to appear. And, as in *Inadi*, Appellant himself did nothing to secure the declarant's testimony.[8] To rebut the offered declaration, Appellant could have attacked the declarant's credibility under rule 806 of the Utah Rules of Evidence, which might have meant subpoenaing Tiffany Brimhall, and if necessary,

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Matick" in the trial Transcript provided by Appellant.

[8] There is no indication that the defendant ever attempted to produce Ms. Brimhall to act as his own witness.

requesting a continuance of the trial to obtain her presence. The same mechanisms for securing compulsory attendance would have been available to Appellant. Instead, Appellant simply counted on Ms. Brimhall's absence to minimize the evidence against him, a routine defense strategy in domestic violence cases at the misdemeanor level.

If the "constitutional 'better evidence' rule" (*Inadi*, 475 U.S. at 396, 106 S.Ct at 1127) proposed by Appellant is adopted by this Court with regard to the excited utterance hearsay exception, the primary tool for the prosecution of misdemeanor domestic violence offenses would be all but removed. What Appellant is suggesting is that, on a routine basis, victims of crime be forced by the government to appear. This approach is not only impossible from a practical perspective, it is morally and politically objectionable in the context of domestic violence cases.

To keep even firmly rooted, highly reliable hearsay exceptions from triers of fact would put an unconscionable power into the hands of domestic violence offenders. By influencing (whether through threats or promises) his victim not to appear at court, a defendant could not only eliminate the risk of troublesome testimony, he could eliminate an entire category of evidence that is "likely to have greater evidentiary value to a trier of fact than in-court statements to the same effect." *Smith*, at 241. The reality is that applying a broad unavailability rule even to firmly rooted hearsay exceptions would serve only to denigrate "the trial's truth-determining process." *White*, 502 U.S. at 354, 112 S.Ct. at 742.

Therefore, should this Court consider adopting the unavailability rule proposed by Appellant or some variation of such a rule, Appellee urges this Court to review and redefine "unavailability." Appellee urges this Court to define unavailability in terms of a continuum based on the offense and the level of the charge. To put it bluntly, a lower standard of "unavailability" should apply to misdemeanors. Such a distinction is already applied in other legal analyses of a constitutional level. For instance, the constitutional right to a trial by jury "is triggered by the type of punishment a defendant faces. *See, e.g.*, *Lewis v. U.S.*, 518 U.S. 322, 135 L. Ed. 2d 590, 116 S. Ct. 2163, 2167 (1996) (noting Supreme Court case law has established that when defendant is charged with petty crime carrying maximum six month prison term, Constitution does not guarantee right to jury trial)." *West Valley City v. McDonald* at 374.

In misdemeanor cases of a class B level or less (which carry a maximum six-month jail term), a similar distinction should be made with regard to Confrontation Clause analyses. Such an approach would permit a finding of unavailability—for purposes of introducing firmly rooted hearsay exceptions with significant indicia of reliability—when a witness to a misdemeanor offense has been served with a subpoena and fails to appear. The same finding of unavailability would apply when the government can show that the witness could not be located at a single last known address.

This approach would acknowledge the reality of misdemeanor prosecution and the inherent reliability of firmly rooted hearsay exceptions, while additional witness-

finding efforts could still be required in the prosecution of felonies and class A misdemeanors. Furthermore, this approach would not prejudice defendants who truly want to examine hearsay declarants, who can avail themselves of the statutory mechanisms for compelling attendance.

V. THE OVERHEARD TELEPHONE CALL IS NOT HEARSAY

A. A statement by a party that is offered against that party is not hearsay

Appellant's Point III asserts that the trial court erred in admitting his statements made over the telephone to Tiffany Brimhall and overheard by Officer Candland. This is a strange and surprising assertion in a Telephone Harassment case, where the language conveyed over the phone *is* the offense. In any event, Rule 801(d) of the Utah Rules of Evidence reads as follows:

> *Statements which are not hearsay*. A statement is not hearsay if:
> (2) *Admission by party-opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity... .

Appellant's claim that this section is inapplicable because Officer Candland was not a voice recognition expert is not persuasive. Identification of the caller is one element of the offense. Other evidence of identification,discussed at length *supra* in this brief, was presented to identify the voice on the telephone. The caller's statements were then offered as evidence against the owner of that voice.

Even without Rule 801(d), Appellant responds to his own Point III with his first paragraph of that section. Hearsay is a statement offered to prove the truth of the matter

asserted, and if "offered simply to prove that it was made, without regard to whether it is true,. ... [it is not] proscribed by the hearsay rule." *State v. Olsen*, 860 P.2d 332, 335 (Utah 1993). The statements overheard by Officer Candland were not offered to show that Appellant actually intended to kill Ms. Brimhall, or that it would in fact be prudent for her to "watch the daycare." Tr. at 41, l. 1. To the contrary, the statements were clearly offered to show that threatening language was conveyed over the phone to another person, in violation of Salt Lake City's Telephone Harassment ordinance.

B. The threats made by Appellant *were* the offense at issue, therefore the probativeness must outweigh any prejudicial effect

Appellant further states in his Point III that his telephone remarks overheard by Officer Candland were "unfairly prejudicial." Br. of Appellant at 28. Appellant does not explain the legal basis for this assertion. Presumably the argument is that the potential prejudicial effect of the statements outweighs their probativeness under rule 403 of the Utah Rules of Evidence. One may as well say that mentioning the fact that someone died is overly prejudicial to a murder suspect. The threatening nature of what was said *was* the crime. Given this, the probative nature of the statements is absolute.

CONCLUSION

Rule 404(b) of the Utah Rules of Evidence permits evidence of "prior acts" when offered to prove identity. Appellant's prior act of appearing at the apartment of Tiffany Brimhall about an hour before the harassing telephone call was received was vital evidence for showing the caller's identity. As a relatively bland act, which was offered to

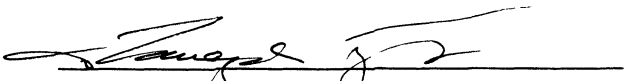
prove an element of the offense, the probativeness of Appellant's prior act far outweighs any imagined prejudicial effect.

As a firmly rooted hearsay exception, the "spontaneous declaration," or excited utterance, has been held by the U.S. Supreme Court to not violate the federal Confrontation Clause even without a finding of the declarant's unavailability. Also, given the context in the present case, where additional indicia of reliability are plentiful and the declaration was offered only for identification purposes and not to show the corpus of the offense, the allowed evidence satifies the concerns of both state and federal confrontation clauses. No analysis has been provided to indicate that the state protections in this instance should be different from the federal. In fact, case law indicates that the Utah Supreme Court has already found the federal approach to be appropriate. Should this Court decide to adopt some version of Appellant's proposed unavailability rule, Appellee urges the Court to define "unavailability" based on the level of the offense and the potential punishments.

As to Appellant's claim that the telephone caller's statements were hearsay, rule 801(d) establishes that statements by a party, which are offered against that party, are not hearsay. And because the threats made by Appellant embodied the charged offense, the probative nature must outweigh any prejudicial effect.

Therefore, this Court should affirm the conviction.

RESPECTFULLY SUBMITTED this 21st day of March, 2000.



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ADDENDUM

Rules cited in this brief

Utah Rules of Evidence

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Utah Rules of Evidence

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rules of Evidence

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Utah Rules of Evidence

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a

statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Utah Rules of Evidence

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Constitution of Utah

Article I, Section 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be mailed or delivered a true and correct copy of the foregoing Brief of the Appellant on this 21st day of March, 2000 to:

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